



Neutral citation number: [2025] UKFTT 00221 (GRC)

Case Reference: FT/EA/2024/0078

**First-tier Tribunal  
General Regulatory Chamber  
Information Rights**

**Heard by Cloud Video Platform  
Heard on: 1 November 2024  
Decision given on: 24 February 2025**

**Before**

**JUDGE STEPHEN ROPER  
MEMBER RAZ EDWARDS  
MEMBER PAUL TAYLOR**

**Between**

**LUCAS AMIN**

Appellant

**and**

**(1) THE INFORMATION COMMISSIONER  
(2) THE SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES**  
Respondents

**Representation:**

For the Appellant: Peter Lockley of Counsel

For the First Respondent: did not appear and was not represented

For the Second Respondent: Charles Streeten of Counsel

**Decision:** The appeal is Allowed

**Substituted Decision Notice:**

The Tribunal's Decision Notice in case reference FT/EA/2024/0078, set out below, is substituted for the Commissioner's Decision Notice reference IC-269312-N0F1, dated 15 January 2024, with regard to the request for information made to The Department For Levelling Up, Housing And Communities by Lucas Amin dated 10 July 2023.

*Substituted Decision Notice*

1. The Department For Levelling Up, Housing And Communities must disclose the information it holds within the scope of the request for information made to it by Lucas Amin dated 10 July 2023, save that the following may be withheld or redacted:
  - a. Annex B of the Ministerial Submission: Assessment of Legal Risk (dated 28 September 2022; pages 14-16 of the closed bundle in the appeal);
  - b. the Legal Advice Annex provided pursuant to the read-out of the Secretary of State (undated; pages 51-52 of the closed bundle in the appeal);
  - c. any other aspects of the information which refer to the legal advice and/or legal risks; and
  - d. the personal data of junior civil servants and any other relevant personal data pursuant to an applicable exception in regulation 13(1) of the Environmental Information Regulations 2004.
2. The Department For Levelling Up, Housing And Communities must disclose such information within 35 days of the promulgation of this decision, or (if there is an application to appeal this decision) within 28 days after being notified of a final unsuccessful outcome to such application or of any unsuccessful resulting appeal.
3. Failure to comply with this decision may result in the Tribunal making written certification of this fact pursuant to section 61 of the Freedom of Information Act 2000 and may be dealt with as a contempt of court.

## **REASONS**

### **Preliminary matters**

1. In this decision, we use the following terms to denote the meanings shown:

Appellant: Lucas Amin.

Commissioner: The Information Commissioner (the First Respondent).

Decision Letter: The Secretary of State's decision letter dated 7 December 2022 setting out the Planning Decision.

Decision Notice: The Decision Notice of the Commissioner dated 15 January 2024, reference IC-269312-N0F1, relating to the Request.

Department: The Department For Levelling Up, Housing And Communities.

Duty to Disclose:	The duty of a public authority to make available on request any environmental information which it holds, pursuant to regulation 5(1) (set out in paragraph 40).
EIRs:	The Environmental Information Regulations 2004.
FOIA:	The Freedom of Information Act 2000.
Ground 1:	The first of the Appellant's grounds of appeal, as referred to in paragraph 20.a.
Ground 2:	The second of the Appellant's grounds of appeal, as referred to in paragraph 20.b.
Planning Application:	The application for planning permission made by West Cumbria Mining Limited in May 2017, as referred to in paragraph 6.
Planning Decision:	The Secretary of State's decision to grant planning permission in respect of the Planning Application.
Public Interest Test:	The test, pursuant to regulation 12(1)(b) (set out in paragraph 46), as to whether, in all the circumstances of the case, the public interest in maintaining the exception to the Duty to Disclose outweighs the public interest in disclosing the information.
Request:	The request for information made to the Department by the Appellant, dated 10 July 2023, as set out in paragraph 12.
Secretary of State:	The Secretary of State for the Department For Levelling Up, Housing And Communities (the Second Respondent).
Withheld Information:	The information falling within the scope of parts 1 and 2 of the Request which was withheld by the Department (and which was provided to the Tribunal in connection with the appeal by way of a closed bundle).

2. Unless the context otherwise requires (or as otherwise expressly stated), references in this decision:

- a. to numbered paragraphs are references to paragraphs of this decision so numbered;
- b. to any regulation are references to the applicable regulation of the EIRs;

- c. to any section are references to the applicable section of FOIA; and
- d. references to section 50 include where that section applies pursuant to regulation 18.

## **Introduction**

- 3. This was an appeal against the Decision Notice, which (in summary) decided that the Department was entitled to refuse to disclose the Withheld Information on the basis that regulation 12(4)(e) (internal communications) was engaged and that the Public Interest Test favoured maintaining the exception to the Duty to Disclose. The Decision Notice did not require the Department to take any steps.
- 4. We considered whether it was necessary for us to provide a closed decision. We concluded that it would not be necessary, on the basis that the reasoning behind this decision can be sufficiently understood without us needing to refer to the specific details of, or disclose any sensitive aspects of, the material in the closed bundle.

## **Background to the Appeal**

- 5. The background to the appeal is as follows.

### ***Contextual background - the Planning Application and the Planning Decision***

- 6. In May 2017, West Cumbria Mining Limited applied for planning permission for a new metallurgical (coking) coal mine near Whitehaven in Cumbria, and some associated development.
- 7. We understand that, pursuant to section 77 of the Town and Country Planning Act 1990, the Secretary of State (at that time, the Rt Hon Michael Gove MP) 'called in' the Planning Application on 11 March 2021 such that the decision to grant or withhold planning permission would be taken by the Secretary of State rather than by the local planning authority.
- 8. In September and October 2021, a local public inquiry was held relating to the Planning Application. On 7 April 2022, the Planning Inspector submitted his report to the Secretary of State recommending that permission be granted. On 7 December 2022, the Secretary of State published the Decision Letter, which granted planning permission largely for the reasons given by the Planning Inspector.
- 9. In January 2023, a legal challenge to the Planning Decision was made by both Friends of the Earth and South Lakes Action on Climate Change. These were listed for a rolled-up hearing. We refer below to those combined legal proceedings as the *Friends of the Earth* case.
- 10. On 13 September 2024 (prior to the hearing of this appeal), the judgment of the

High Court was given in respect of that litigation<sup>1</sup>. The High Court's judgment ordered the quashing of the Planning Decision. We understand that there was no application made seeking permission to appeal that judgment and accordingly that it stands, so that the matter has been remitted to the Secretary of State to redetermine.

11. In the course of that litigation, an application by Friends of the Earth for specific disclosure of the ministerial submission to the Secretary of State (the subject matter of the Request) was refused by the High Court.

### **The Request**

12. On 10 July 2023, the Appellant requested information from the Department, via the website [whatdotheyknow.com](https://www.whatdotheyknow.com), in the following terms:

*"This is an EIRs request about the Secretary of State Michael Gove's decision to grant planning permission to a new coal mine in Whitehaven, Cumbria in December 2022. I write to request:*

*1. A full copy of the ministerial submission which was drafted for the Secretary of State. I expect this submission to include, but not necessarily be limited to, the summary, options appraisal and recommendations sections as well as any annexes and/or addendums.*

*2. A full copy of Secretary of State Michael Gove's reply to the submission.*

*3. Correspondence - including letters, emails and attachments between Secretary of State Michael Gove and the Secretary of State for Business, Energy and Industrial Strategy during the month of December 2022."*

13. The Department responded on 9 August 2023 stating that the information sought in part 3 of the Request was not held. It confirmed that it held the information sought by parts 1 and 2 of the Request but stated that this was withheld on the basis that regulation 12(4)(e) was engaged and that the Public Interest Test favoured maintaining the exception.
14. The Appellant asked the Department for an internal review in respect of its response to parts 1 and 2 of the Request. Following that internal review, the Department wrote to the Appellant on 16 October 2023, upholding the application of regulation 12(4)(e) to the Requested Information.
15. On 8 November 2023, the Appellant contacted the Commissioner to complain about the Department's response to the Request. Subsequently, the Commissioner therefore issued the Decision Notice.

### **The Decision Notice**

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<sup>1</sup> *Friends of the Earth Limited v Secretary of State for Levelling Up, Housing and Communities* [2024] EWHC 2349 (Admin)

16. In the Decision Notice:

- a. the Commissioner decided that the Withheld Information was the Department's internal information and consequently that regulation 12(4)(e) was engaged;
- b. in respect of the associated Public Interest Test, the Commissioner:
  - referred to matters which he had considered in a previous decision notice<sup>2</sup> in respect of part of the Requested Information which had been requested at an earlier date (13 December 2022);
  - formed the view that he must consider whether the circumstances present at the time of the Request were substantially different so as to change the outcome of the Public Interest Test in that previous decision notice;
  - concluded that the circumstances present at the time of the Request were not substantially different;
- c. in respect of matters favouring disclosure of the Withheld Information, the Commissioner:
  - recognised the public interest in the openness and transparency of the decision-making process regarding the Planning Decision and in the accountability of government regarding the Planning Decision;
  - noted that certain information relating to the Planning Application and the Planning Decision was already within the public domain;
  - considered that the Planning Application had been subject to "significant transparency";
- d. in respect of matters favouring maintaining the exception in regulation 12(4)(e), the Commissioner considered (also applying the findings in his earlier decision notice) that as a result of the legal challenge to the Planning Decision, which was a "live matter", there was a greater public interest in maintaining the exception;
- e. took into account the presumption in favour of disclosure pursuant to regulation 12(2), but decided that the Public Interest Test favoured maintenance of the exception under regulation 12(4)(e).

17. During the course of the Commissioner's investigation, the Department advised the Commissioner that it also sought to rely upon the exceptions in regulation 12(5)(b) (the course of justice, etc) and regulation 13 (personal data). However, as the Commissioner concluded that regulation 12(4)(e) applied to all of the Withheld Information, the Decision Notice did not go on to consider the

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<sup>2</sup> Reference IC-217947-M8W3, dated 13 May 2023.

application of regulation 12(5)(b) or regulation 13.

## **The appeal**

18. Regulation 18 provides that the enforcement and appeals provisions of FOIA (namely Part IV, including Schedule 3, of FOIA and Part V of FOIA) apply for the purposes of the EIRs, subject to certain modifications.
19. For the reasons we have given in paragraph 34, this was therefore an appeal against the Decision Notice pursuant to the EIRs, in accordance with section 57 as applied by regulation 18.

## ***The grounds of appeal***

20. The Appellant accepted that regulation 12(4)(e) was engaged in respect of the Requested Information. His grounds of appeal were based on his views that:
  - a. there was procedural unfairness in the Commissioner's investigation ('Ground 1');
  - b. the Commissioner erred in concluding (in respect of the Public Interest Test) that the public interest favoured maintaining the exception in regulation 12(4)(e) ('Ground 2').
21. In respect of Ground 1, the Appellant argued (in summary) that:
  - a. the Commissioner was wrong to refuse to allow the Appellant an opportunity to respond to the Department's arguments on the basis that they were confidential;
  - b. that approach was unfair to those requesting information, who are already at a disadvantage because they do not know what the disputed information contains, and led to the wrong decision in the present case;
  - c. that unfairness would not be cured by the 'de novo' hearing in the appeal if the Department's arguments were to remain confidential.
22. In respect of Ground 2, the Appellant argued (in summary) that the factors for disclosure easily outweighed those in favour of maintaining the exception, especially when the presumption in favour of disclosure was applied.

## ***The Tribunal's powers and role***

23. The powers of the Tribunal in determining this appeal are set out in section 58 (which applies pursuant to regulation 18), as follows:

*"(1) If on an appeal under section 57 the Tribunal considers—*

*(a) that the notice against which the appeal is brought is not in accordance with the law, or*

*(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

*the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*

*(2) On such an appeal, the Tribunal may Review any finding of fact on which the notice in question was based."*

24. In summary, therefore, the Tribunal's remit for the purposes of this appeal is to consider whether the Decision Notice was in accordance with the law. In reaching its decision, the Tribunal may review any findings of fact on which the Decision Notice was based and the Tribunal may come to a different decision regarding those facts. Essentially, the Tribunal is empowered to undertake a 'full merits review' of the appeal before it (so far as the Decision Notice is concerned).

### ***Mode of hearing***

25. The proceedings were held by the cloud video platform. The Tribunal panel and the parties (except for the Commissioner) joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
26. There were no interruptions of note during the hearing, although on occasion the hearing was briefly adjourned in order for the Tribunal Panel to obtain copies of documents which had been filed with the Tribunal office but not received by the Panel. These adjournments had no material adverse effect on proceedings.
27. The Appellant was represented by Peter Lockley of Counsel. The Commissioner did not appear and was not represented. The Secretary of State was represented by Charles Streeten of Counsel.

### ***The evidence and submissions***

28. The Tribunal read and took account of an open bundle of evidence and pleadings, as well as a closed bundle which contained the Withheld Information. We also received and took account of a written skeleton argument from the Secretary of State and a written note from the Appellant responding to that skeleton argument, as well as a separate bundle of authorities.
29. The open bundle included a witness statement on behalf of the Appellant. The witness statement was given by Christopher James Skidmore OBE, currently Professor of Practice on Net Zero Policy in the Department of Social & Policy Sciences at the University of Bath. The witness statement explained that, amongst various other roles, Mr Skidmore was previously Conservative MP for Kingswood, the Minister of State at the Department for Education, the Minister of State at the Department for Business, Energy and Industrial Strategy, the



Minister of State at the Department of Health and Social Care and the Parliamentary Secretary at the Cabinet Office.

30. We heard oral submissions from Mr Lockley on behalf of the Appellant and from Mr Streeten on behalf of the Secretary of State.
31. All of the contents of the bundles, as well as the Secretary of State's skeleton argument and the Appellant's note in response, were read and considered, and all of the submissions from the parties were taken into account, even if not directly referred to in this decision.
32. During the hearing, the Tribunal held a closed session where the Tribunal Panel asked questions regarding the Withheld Information. A gist of the closed session, approved by Mr Streeten during it, was provided at the resumed open hearing.

### ***Outline of relevant issues***

33. We briefly address some preliminary points regarding the issues before us.

### ***Application of the EIRs***

34. The heading to the Decision Notice referred to both the EIRs and FOIA, but was evidently issued pursuant to (and addressed only exceptions under) the EIRs. There was no dispute between the parties that the EIRs (rather than FOIA) applied to the Requested Information. For completeness, we find the EIRs did apply, on the basis that the Withheld Information comprises correspondence relevant to limb 'c' of the definition of 'environmental information' as set out in paragraph 41 (and having regard to the broad interpretation of 'environmental information' which is required, as referred to in paragraph 42).

### ***Engagement of regulation 12(4)(e)***

35. There was also no dispute between the parties regarding regulation 12(4)(e) being engaged in respect of the Requested Information. Again, for completeness, we find that that regulation was engaged, on the basis that the Requested Information comprised internal communications.

### ***Other exceptions***

36. The Appellant accepted that:
  - a. any legal advice contained in the Withheld Information could be withheld under regulation 12(5)(b); and
  - b. any personal data relating to junior civil servants in the Withheld Information could be withheld under regulation 13.
37. During the hearing (having regard to the relevant principles from *NHS England v*

*Information Commissioner & Dean*<sup>3</sup>) we asked Mr Streeten if there were any submissions in respect of any other potential exceptions which the Secretary of State might wish to rely on. He confirmed that there were no other potential exceptions for us to take into account.

### Summary

38. Our decision therefore focusses on the aspects of the appeal regarding the Decision Notice's findings in respect of the Public Interest Test for the purposes of regulation 12(4)(e). In particular, we have addressed whether the Commissioner was correct to conclude, in the Decision Notice, that the public interest favoured maintaining the exception in that regulation.
39. Those issues are applicable to Ground 2. We also briefly address Ground 2 further below.

### **The relevant statutory framework<sup>4</sup>**

#### General principles

40. The EIRs provide individuals with a general right of access to environmental information held by public authorities, subject to some exceptions. Regulation 5(1) provides:

*"...a public authority that holds environmental information shall make it available on request."*

41. The term 'environmental information' is defined in regulation 2(1) which, so far as is material, states:

*"...any information in written, visual, aural, electronic or any other material form on*

*(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

*(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*

*(c) measures (including administrative measures), such as policies, legislation, plans,*

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<sup>3</sup> [2019] UKUT 145 (AAC); see in particular paragraphs 11 and 12

<sup>4</sup> We acknowledge the Practice Direction dated 4 June 2024 (<https://www.judiciary.uk/guidance-and-resources/practice-direction-from-the-senior-president-of-tribunals-reasons-for-decisions/>) and particularly paragraph 9, which refers to the First-tier Tribunal not needing to specifically refer to relevant authorities. We include references to the applicable legislative framework, to provide relevant context, but have accordingly not set out details of (including any detailed analysis in respect of) the applicable case law.

*programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements...".*

42. The definition of 'environmental information' is to be given a broad meaning in accordance with the purpose of the underlying European Council Directive which the EIRs implement (Directive 2004/4/EC).<sup>5</sup>

43. Therefore, pursuant to regulation 5(1), a person who has made a request to a public authority for 'environmental information' is entitled to have that information made available to them, if it is held by the public authority. However, that entitlement is subject to the other provisions of the EIRs, including some exceptions and qualifications which may apply even if the requested environmental information is held by the public authority. The opening wording of regulation 5(1) (that is, the wording immediately preceding the extract of that regulation quoted above) provides:

*"Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations..."*

44. Part 3 of the EIRs contains various exceptions to the duty to disclose environmental information which has been requested. It is therefore important to note that the EIRs do not provide an unconditional right of access to any environmental information which a public authority does hold. The right of access to information contained in regulation 5(1) is subject to certain other provisions of the EIRs.

45. Requests for 'environmental information' are normally dealt with under the EIRs rather than FOIA, pursuant to section 39(1) (which contains an exemption to disclosure of environmental information under FOIA).

### Regulation 12

46. As noted, Part 3 of the EIRs contains various exceptions to the duty to disclose environmental information which has been requested. Within Part 3 of the EIRs, regulation 12(4)(e) (internal communications) is applicable for the purposes of this appeal. So far as is relevant, regulation 12 provides:

*"(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—*

*(a) an exception to disclosure applies under paragraphs (4) or (5); and*

*(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*

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<sup>5</sup> See the Court of Justice of the European Union in Case C-316/01 *Glawischnig v Bundesminister für soziale Sicherheit und Generationen* [2003] All ER (D) 145 and the case of *Department for Business, Energy and Industrial Strategy v Henney and Information Commissioner* [2017] EWCA Civ 8444.

...

*(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—*

...

*(e) the request involves the disclosure of internal communications."*

47. Summarising the above for current purposes, a public authority (such as the Department) may refuse to disclose environmental information which is requested under the EIRs:
- a. to the extent that the request involves the disclosure of internal communications; and
  - b. if the Public Interest Test favours maintaining the exception to the Duty to Disclose.
48. Pursuant to regulation 12(2), a public authority must apply a presumption in favour of disclosure of environmental information.

## **Discussion and findings**

### Ground 1

49. In respect of Ground 1, the Appellant considered that it was not fair, and not in the spirit of the legislation, to not keep him informed of the progress of the Commissioner's investigation under section 50. He also considered that he should have been given the opportunity to make further representations and/or respond to the Department's arguments raised during that investigation.
50. A particular concern of the Appellant was the Commissioner's 'unwillingness' to share the Department's submissions with him, on the basis that such submissions were provided to the Commissioner for regulatory purposes and were confidential. As we have noted, the Appellant considered that that approach was unfair to those requesting information and that that unfairness would not be cured by the appeal if the Department's arguments were to remain confidential.
51. As we noted in paragraph 24, the scope of the Tribunal's jurisdiction relates to the lawfulness of the Decision Notice. Any other issues are beyond the Tribunal's powers to determine and fall outside of the scope of the appeal. Accordingly, the Tribunal's jurisdiction does not extend to any matters regarding the Commissioner's investigation prior to the issue of the Decision Notice under section 50. Put another way, the Tribunal does not conduct a judicial review of the Commissioner's activities. It is therefore outside of our remit to make any finding in respect of the Commissioner's conduct of his investigation leading to the Decision Notice, including in respect of the Appellant's allegations regarding

any inherent unfairness in respect of the procedure which was followed in determining the section 50 complaint.

52. For those reasons, we are unable to make any finding in respect of Ground 1.

53. However, we would briefly observe, incidentally, that:

- a. the relevant investigation correspondence was disclosed to the Appellant in connection with the appeal;
- b. there are established principles to be followed where there is any closed material in any appeal before the Tribunal, to mitigate any potential disadvantages to parties who are not privy to that material.

### Ground 2 – Preliminary

54. In respect of Ground 2, the positions of both the Secretary of State and the Commissioner were largely aligned, so far as material. Consequently, partly for convenience and partly because of the Secretary of State’s representation in person at the hearing, our comments in respect of Ground 2 generally refer only to the position or views of the Secretary of State, but this should be taken as including reference to the Commissioner’s position or views to the extent applicable - and no disrespect to the Commissioner is intended by this approach.

### Ground 2 – Arguments in respect of the Tribunal’s approach

55. Mr Streeten argued that the Tribunal’s approach in determining the appeal should be in accordance with the principles set out in the case of *R (Hope and Glory Public House Limited) v City of Westminster Magistrates’ Court*<sup>6</sup>, to the effect that:

- a. the Tribunal should pay ‘careful attention’ to the Commissioner’s decision (in the Decision Notice); and
- b. in determining what weight to give to his decision, the Tribunal should take into account the fullness and clarity of his reasons, the nature of the issues and any evidence.

56. Mr Streeten’s position appeared to be that some deference should be shown to the Decision Notice and/or that the Appellant must show that the Commissioner’s decision is ‘clearly wrong’. Indeed, Mr Streeten’s skeleton argument stated (with specific reference to the *Hope & Glory* case) that “*the Appellant has not demonstrated that the Commissioner’s decision was wrong, which is the test he must meet*”.

57. We agree with Mr Lockley that that is not the correct approach, which would be

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<sup>6</sup> [2011] EWCA Civ 31 (which Mr Streeten stated was approved by the Supreme Court “in a tribunal context” in *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60.)

inconsistent with the Tribunal's remit in accordance with section 58 (as we explained in paragraph 24) and the various authorities<sup>7</sup> confirming the role of the Tribunal. In summary, those authorities settle that the Tribunal undertakes a 'fresh review' of a public authority's response to a request for information under FOIA or the EIRs, exercises a 'full merits appellate jurisdiction' and essentially 'steps into the shoes' of the Commissioner to decide which (if any) of the exemptions or exceptions in FOIA or the EIRs apply.

58. Likewise, there is no authority which imposes the burden of proof upon the Appellant to demonstrate that the Decision Notice is not in accordance with the law. In dealing with a complaint pursuant to section 50, the Commissioner does not make a resulting decision on the basis that the complainant or the public authority manages or fails to discharge any purported burden of proof. It is no different for the Tribunal's decision. Accordingly, the appeal does not involve a question of whether the Appellant has discharged a burden of proof regarding the matters which are the subject of his appeal. The appeal therefore does not require the Appellant to demonstrate that the Decision Notice was wrong, as Mr Streeten had argued. Our role was to consider all of the evidence in order to determine whether or not the Decision Notice involved an error of law, in accordance with the Tribunal's powers which we have outlined.

### Ground 2 – The Public Interest Test

59. We turn now to consider whether the public interest in maintaining the exception in regulation 12(4)(e) outweighed the public interest in disclosing the Withheld Information. As per regulation 12(1)(b), this is to be assessed 'in all the circumstances of the case'.
60. The parties referred us to various authorities relating to the application of the Public Interest Test and other relevant principles. However, there was no fundamental dispute between the parties in respect of such matters, except in respect of the timing of the Public Interest Test (which we address below). Aside from that, the material issues between the parties were related to whether the Public Interest Test favoured maintaining the exception in regulation 12(4)(e) or favoured disclosure of the Withheld Information. This decision therefore focuses on the issues, rather than the underlying legal principles behind them.

### *The Timing of the Public Interest Test*

61. As we have noted, the parties' views differed in respect of the timing of the Public Interest Test.
62. Mr Streeten referred to the High Court's judgment which ordered the quashing of the Planning Decision (see paragraph 10) and argued that, because matters had changed, the public interest in maintaining the exception under regulation

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<sup>7</sup> Including, in particular, *Birkett v Department For The Environment, Food and Rural Affairs* [2011] EWCA Civ 1606, *Information Commissioner v Home Office* [2011] UKUT 17 (AAC) and *Information Commissioner v Malnick* [2018] UKUT 72 (AAC).

12(4)(e) had “intensified”. He submitted that there was now an even stronger public interest in maintaining the exception under regulation 12(4)(e) than there was at the date of the Decision Notice.

63. It is well established that, in determining the Public Interest Test, the public interest is to be considered as matters stood at the date of a public authority’s decision to refuse a request for information<sup>8</sup>. Accordingly:
- a. it is not the date of the Decision Notice which is relevant, but rather the date of the Department’s refusal to disclose the Withheld Information; and
  - b. matters arising since the date of the Department’s refusal are not to be taken into account in the Public Interest Test.
64. Given the above, we do not accept Mr Streeten’s arguments regarding the relevance of any change in circumstances since the date of the Department’s refusal decision, but we have instead considered matters as they stood on that date.

#### *Arguments in favour of disclosure*

65. The Appellant argued that the “extremely controversial” nature of the Planning Decision meant that there was an “extremely weighty” public interest in disclosure of the Withheld Information.
66. The Secretary of State did not dispute that there is some public interest in disclosure of the Withheld Information. The Secretary of State accepted that disclosure would promote greater transparency and accountability and would encourage greater public awareness and understanding in relation to the relevant environmental issues. The Secretary of State also accepted that the Planning Application and the Planning Decision were “highly controversial” and that this was relevant to the public interest factors in favour of disclosure.
67. However, the Secretary of State’s position was that, notwithstanding that controversy, the public interest in the disclosure of the Withheld Information was limited. In part, this was because a public inquiry had been held, at which the issues raised were “ventilated in considerable detail” and because a lengthy report had been produced by a specialist planning inspector. That report had set out in detail the cases presented by the parties which appeared at the inquiry, as well as the Inspector’s reasons for recommending that planning permission be granted.
68. Mr Streeten also put forward other arguments relating to the issue of transparency (and the controversy), which we address below in the section on arguments in favour of maintaining the exception.

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<sup>8</sup> See, for example, *All Party Parliamentary Group on Extraordinary Rendition v The Information Commissioner and the Foreign & Commonwealth Office* [2015] UKUT 377 (AAC), *Maurizi v The Information Commissioner & The Crown Prosecution Service* [2019] UKUT 262 (AAC) and *Montague v The Information Commissioner and The Department for Business and Trade* [2022] UKUT 104 (AAC).

69. The Appellant also argued, in his grounds of appeal, that other factors favoured disclosure, beyond the public interest in transparency. These included arguments that the Decision Letter made no reference (and accordingly appeared to give no weight) to the “repercussions for climate diplomacy”. The Secretary of State disputed that, arguing that that issue was expressly addressed by the Inspector and had been raised by various parties to the inquiry.
70. The Appellant also relied on Mr Skidmore’s witness statement regarding the lack of need for coking coal and issues regarding the detrimental effect that the Planning Decision had on the UK’s standing in international climate fora, including Mr Skidmore’s stated concerns among allies such as the United States that the mine which was the subject of the Planning Application breaches the UK’s climate commitments. Mr Skidmore’s witness statement also expressed his views on the public interest in there being the greatest possible transparency over the Planning Decision, including by way of disclosure of the Withheld Information.
71. The Appellant also stated that he did not know whether the ministerial submission recommended granting or refusing the Planning Application, but he submitted that it was in the public interest for this to be known, in either case. We comment later below (paragraph 92) on the Appellant’s arguments in respect of this.
72. Another argument of the Appellant was that the Decision Letter and the Inspector’s report did not make reference to public concerns about the impartiality of the Inspector. Again, this was disputed by the Secretary of State, who submitted that the Inspector had never been accused of bias, was not asked to recuse himself and the Planning Decision was not challenged on the grounds of any alleged bias.
73. The Appellant accepted that, as noted above, the Secretary of State’s reasons relating to the Planning Decision, set out in the Decision Letter, accorded with the reasoning in the Inspector’s report. However, the Appellant’s position was that the Decision Letter dealt only very briefly with developments since the Inspector’s report and his grounds of appeal referred to various matters which the Appellant considered were not addressed in the Decision Letter. The Appellant considered that it was in the public interest to know whether the ministerial submission briefed the Secretary of State on those subsequent developments and, if so, what advice was given.
74. The Secretary of State asserted that the Decision Letter was transparent regarding relevant matters and the further information was taken into account following the close of the inquiry, with the Decision Letter including an annex showing what post-inquiry material was taken into account. The Secretary of State also stated that the approach taken accorded with the relevant statutory requirements. The Secretary of State considered that knowing whether the ministerial submission recommended granting or refusing the Planning



Application was of limited value, particularly given the information which was already in the public domain, and that ultimately what mattered was the decision which the Secretary of State took.

75. In our view, however, it is not ‘ultimately’ the Secretary of State’s decision which matters. This is because there is a much wider context which is relevant for current purposes – namely that the Request was made pursuant to the EIRs and (given the engagement of regulation 12(4)(e)) there is a need to consider the associated Public Interest Test. Consequently there are also other, broader, factors to take into account, because of the requirement to assess ‘all of the circumstances’ in accordance with regulation 12(1)(b).

#### *Arguments in favour of maintaining the exception*

76. Mr Streeten referred us to the Commissioner’s published guidance on regulation 12(4)(e). We are mindful that that guidance is essentially a reflection of the position of another party to the appeal (namely the Commissioner, as the First Respondent). That said, we do not disagree with the relevant principles set out there. Moreover, we accept the fundamental premise to which that guidance refers, which is that the underlying rationale behind the exception in regulation 12(4)(e) is that public authorities should have the necessary space to think in private, in order to develop ideas, debate live issues and reach decisions. We also agree with the points made in the guidance that relevant considerations for the Public Interest Test should likewise focus on the protection of internal deliberation and decision-making processes, as applicable to the need to protect a public authority’s need for a ‘private thinking space’ for the purposes of this exception.
77. Whilst the Commissioner’s guidance addresses both the need for a ‘safe space’ and ‘chilling effect’ principles, the main arguments of the Secretary of State in favour of maintaining the exception in regulation 12(4)(e) related to the need for a ‘safe space’, although the Secretary of State did also rely on the concept of the ‘chilling effect’ were the Withheld Information to be disclosed.
78. The Secretary of State contended that, as the Planning Application had now been remitted to the Secretary of State to redetermine following the High Court’s decision, there were a number of ‘live’ issues which the Secretary of State needed to determine and accordingly that it was important that the Secretary of State (and those who advise her) has a safe space in which to think and consider those matters. However, as we have noted, the relevant date for assessing the Public Interest Test is at the date of the Department’s refusal of the Request (9 August 2023). As the Decision Letter was published on 7 December 2022, the decision to approve the Planning Application had been taken, and communicated to the public, some 8 months previously. We therefore find that the need for a safe space was negated, at least to some extent if not entirely, at the date of the Department’s refusal. Indeed, as the Commissioner’s guidance states: *“The need for a safe space is strongest when the issue is still live. Once you have made a decision the argument will carry little*

*weight."*

79. We accept that the Planning Decision was subject to a legal challenge at the relevant date, but we agree with the Appellant's arguments that this is not relevant to the question of a safe space, which is only needed to protect internal discussions.
80. We also recognise that a safe space may still be needed after a decision is made, in order to properly promote, explain and defend the key points (as mentioned in the Commissioner's guidance). However, we consider that the need for any such subsequent safe space, after the relevant decision has been made, is limited in time. We agree with the Appellant's arguments that the public interest in maintaining the exception will be strongest when the issues under consideration are still live but that the weight to be afforded to the need for safe space will rapidly diminish once a decision has been taken, particularly once it has been communicated to the public. Again, this is reflected in the Commissioner's guidance which states "*This safe space only lasts for a short time, and once you have made an initial announcement, there is likely to be increased public interest in scrutinising and debating the details of the decision.*". Whilst the Planning Decision was subject to a legal challenge at the date of the Department's refusal of the Request, the Planning Decision itself had been made, and published, several months previously. Consequently, we find that there was little or no need for a safe space by the time of the Department's refusal.
81. Linked to the arguments we outlined earlier regarding the issue of transparency, Mr Streeten submitted that the Secretary of State's own reasons relating to the Planning Decision almost entirely accorded with the reasoning in the Inspector's report and were set out in detail in the Decision Letter. He also referred to the unsuccessful application in the *Friends of the Earth* case for specific disclosure of the ministerial submission made to the Secretary of State (in anticipation of the planning statutory review), which we mentioned in paragraph 11. Mr Streeten pointed out that the court found<sup>9</sup> that the Inspector's report and the Decision Letter provided the complete reasoning of the decision-maker on the significant controversial issues, in accordance with the statutory duty under Rule 18 of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000.
82. Whilst we accept the points in the preceding paragraph, the legal position in respect of appeal before us is different to the legal position arising under the civil case before the High Court. The appeal before us is subject to a different statutory regime, namely the EIRs, and consequently the issues in the appeal are different. With all due respect to the decisions made in the High Court in the *Friends of the Earth* case, those decisions are not binding on us, given the different statutory regime and the different issues arising in the appeal. The

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<sup>9</sup> *Friends of the Earth Ltd v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 3255 (KB), paragraphs 6 and 31.

High Court decided that it was not necessary for the ministerial submission to be disclosed in the *Friends of the Earth* case, for the purposes of the issues which it needed to decide in that case. However, we are required to consider matters afresh, in the context of the EIRs, in accordance with our remit (to which we have already referred).

83. Consequently, the fact that the High Court did not order disclosure of the ministerial submission in the *Friends of the Earth* case is not seminal for the purposes of this appeal, in that we needed to consider all of the evidence before us and make our own decision regarding the lawfulness of the Decision Notice pursuant to the EIRs. That said, we have taken that fact into account (as part our own consideration of all of the circumstances) for the purposes of the Public Interest Test. However, we consider that little weight is to be attached to this as a factor favouring maintaining the exception.
84. We also agree with Mr Lockley's argument that, because the High Court had ruled that the Withheld Information was not relevant to the legal challenge before it (namely, the order to refuse disclosure of it for the purposes of those proceedings), it is hard to see how the Secretary of State would be prejudiced by disclosure of it under the EIRs.
85. We took into account the arguments of Mr Streeten to the effect that, should the planning inquiry be reopened (which was a possibility and in which case the matter would be remitted back to the Planning Inspectorate) then the publication of the Withheld Material would risk interfering with that process. In particular, Mr Streeten contended that it would be "*undesirable for the publication of previous advice given to the Secretary of State by the Planning Casework Unit to risk tainting the Inspector's reasoning in making any further recommendations to the Secretary of State*". However, Mr Streeten's arguments also referred to the "expert" role of the Inspector who is "*independent of the Department*" and who "*considers the issues and brings to bear his considerable professional expertise upon them*" before making his or her recommendations which would then fall to be considered by the Department and (ultimately) the Secretary of State. Mr Streeten considered that this 'inverting' of the process created a strong public interest in maintaining the exception, as Planning Casework Unit officials should have the freedom to make their own professional assessment of the planning merits of cases called-in for a decision by the Secretary of State.
86. However, we were not persuaded by those arguments of Mr Streeten. On the contrary, in our view, it is difficult to see how such independent planning inspectors who have considerable professional expertise should have their views tainted in any material way simply by knowing what recommendations were made previously.
87. Mr Streeten also stated that called-in decisions involve cases of more than local importance and consequently have greater significance than most planning decisions, which he submitted was a factor supporting his public interest

arguments favouring maintaining the exception. In our view, however, that 'greater significance' is actually a factor which adds weight to the arguments supporting disclosure, rather than maintaining the exception.

88. Mr Streeten further submitted that the highly technical and complex nature of many called-in decisions (such as the Planning Decision) should be taken into account, particularly given that *"the Secretary of State is a politician and does not necessarily have any particular expertise in the field of town and country planning"*. Again, we find that this factor is actually of more relevance to the arguments supporting disclosure, rather than maintaining the exception, on the basis that there is a public interest in knowing what advice the Secretary of State received before making the Planning Decision, given that lack of expertise - and even more so given the controversial nature of the Planning Decision.
89. As we have noted, the Secretary of State's arguments included some (limited) reference to the 'chilling effect' in support of her position that the Public Interest Test favoured maintaining the exception. There was no evidence of the 'chilling effect' before us, although we acknowledge that case law has established that there does not necessarily need to be any such specific evidence. However, on the facts of this case, we do not accept that there would be any material 'chilling effect' should the Withheld Information be disclosed. This is mainly because we consider that those involved in making ministerial submissions, such as the ministerial submission in the Withheld Material, should have an expectation that the submissions are at risk of disclosure in the public interest - and particularly so where the subject matter is controversial, as is the case in respect of the Planning Decision. Indeed, there is a substantial body of case law which establishes that assertions of a "chilling effect" are to be treated with some caution. As we have stated, on the facts before us, we do not accept that there would be any material 'chilling effect' should the Withheld Information be disclosed. Consequently we find that little weight should be afforded to this factor in respect of the public interest in maintaining the exception.

#### *Conclusions - outcome*

90. In coming to our conclusion on the outcome of the Public Interest Test, we reiterate that it required a consideration of all of the circumstances. We have taken into account all of the arguments put forward by the parties, in respect of factors favouring disclosure and factors favouring maintaining the exception.
91. As we have noted, there were some disputed issues between the parties regarding the Inspector's involvement and other matters relating to the Planning Decision, such as the Appellant's allegations regarding matters which were not addressed in the Decision Letter. It is not our role to determine any such issues, but we consider that the fact that there are such matters of dispute is a further relevant factor to be taken into account for the purposes of the Public Interest Test favouring disclosure, linked to the arguments we have already outlined regarding transparency and accountability.

92. Taking everything into account, there is one factor in particular which we consider to be important, which is the lack of public knowledge as to whether or not the ministerial submission recommended granting or refusing the Planning Application. Given that this is an open decision, we will not comment on whether or not it did, but we find that this is an important factor favouring disclosure. We consider that, as the Appellant argued, if it recommended refusal, then it is in the public interest to understand officials' reasons for that advice and any reasons of the Secretary of State for not following that advice, particularly given the controversy surrounding the Planning Decision. Equally (again, as argued by the Appellant), we consider that there is public interest to know if the ministerial submission did recommend a refusal for the purposes of transparency and informing public debate on the issue. We should stress, though, that we make no comment as to the contents of the Withheld Information and nothing we say should be taken as an indication as to whether or not the Withheld Information provides any relevant insights into the issues raised by the Appellant.
93. Summarising matters, we find that there are various factors (as we have outlined) favouring disclosure and that together they demonstrate a very strong public interest in favour of disclosure of the Withheld Information. In contrast, we find that the factors favouring maintaining the exception in regulation 12(4) (e) are weak. Consequently we find that the Public Interest Test clearly favours disclosing the Withheld Information.
94. In our view, the Commissioner erred in the Decision Notice by attaching too little weight to the factors favouring disclosure and too much weight to the factors favouring maintaining the exception. In particular, we consider that the Commissioner, in the Decision Notice, attached too much weight to the fact that certain information was already within the public domain relating to the Planning Application and the Planning Decision. The Commissioner considered that there had been "significant transparency" but there are still gaps in what has been disclosed (as we have referred to) and in our view greater transparency is required, especially given the controversial nature of the Planning Decision.
95. It has not been necessary for us to apply the presumption in favour of disclosure pursuant to regulation 12(2), given that we have concluded that the interests in the Public Interest Test are not equally balanced.

## **Final conclusions**

96. For all of the reasons we have given, we find that the Commissioner was correct in deciding, by way of the Decision Notice, that the exception in regulation 12(4) (e) was engaged in respect of the Withheld Information. However, we find that the Decision Notice involved an error of law in concluding, in respect of the Public Interest Test, that the public interest favoured maintaining that exception.

97. We therefore allow the appeal and we make the Substituted Decision Notice as set out above.

Signed: Stephen Roper  
Judge of the First-tier Tribunal

Date: 18 February 2025